Supreme Court, U. S.
FILED
DEC 28 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1975
No. 75-775

MILTON J. SHAPP, Individually and as Governor of the Commonwealth of Pennsylvania, WILLIAM H. WILCOX, Individually and as State Fuel Allocation Officer of the Commonwealth of Pennsylvania, ROBERT P. KANE, Attorney General, Commonwealth of Pennsylvania, and the COMMONWEALTH OF PENNSYLVANIA, for Itself and on Behalf of Its Residents and Citizens,

Petitioners

v.

FRANK G. ZARB, Administrator, Federal Energy Office; JOHN W. WEBER, Assistant Administrator for Operations and Compliance, Federal Energy Office; JOSEPH A. LA SALA, Regional Administrator, Region III, Federal Energy Office; FEDERAL ENERGY OFFICE; ATLANTIC RICHFIELD CORPORATION; EXXON CORPORATION; SUN OIL COMPANY, INC.; GULF OIL CORPORATION; MOBIL OIL CORPORATION; TEXACO, INC.; AMOCO OIL COMPANY; ASHLAND OIL, INC. B P OIL CORPORATION; BP OIL, INC.; UNITED REFINING COMPANY; PHILLIPS OIL COMPANY; GETTY OIL COMPANY (EASTERN OPERATIONS); AMERADA HESS CORPORATION; CITIES SERVICE OIL COMPANY; AGWAY PETROLEUM CORPORATION; CHEVRON OIL COMPANY; PENNZOIL COMPANY; SHELL OIL CO.; CONTINENTAL OIL COMPANY; UNION OIL COMPANY OF CALIFORNIA; CROWN CENTRAL PETROLEUM CORPORATION; CHAMPLIN PETROLEUM COMPANY; CLARK OIL & REFINING CORPORATION; TEXAS CITY REFINING, INC.; PETROLEUM MARKETING CORPORATION; KERR-McGEE CORPORATION,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

LAWRENCE SILVER
Deputy Attorney General
HOWARD M. SNYDER
Deputy Attorney General
ROBERT P. KANE
Attorney General
Attorneys for Petitioners

Dept. of Justice
Capitol Annex
Harrisburg, Pa. 17120

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

TABLE OF CONTENTS

	Page
PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES:	1
I. Opinions Below	2
II. Jurisdiction	2
III. Questions Presented	3
IV. Statutory Provisions Involved	4
V. Statement of the Case	5
VI. Reasons for Granting the Writ:	
A. The question presented in this case is a matter of great public concern	8
B. The courts below erroneously decided the issues	10
C. The lower Court misconstrued and misapplied the doctrine enunciated by this court in Massachusetts v. Mellon	15
VII. Conclusion	18

APPENDIX:

1. Motion for Leave To File an Amended and Supplemental Complaint	1a-25a
2. First Amended Complaint	3a-18a
3. FEO's Motion To Certify Constitutional Question	26a-31a
4. District Court Memo, Opinion and Order, November 4, 1974	32a-43a

5. TECA Opinion 44a-48a
6. District Court Memo, Opinion and Order, April 24, 1975 .....49a-58a
7. TECA Opinion and Order 59a-64a
8. TECA Order Denying Reconsideration and Rehearing 65a
9. Emergency Petroleum Allocation Act of 1973 .....66a-91a
10. Statute Extending the Emergency Petroleum Allocation Act of 1973 to November 15, 1975 .....92a-95a
11. Washington Post—Tuesday, Sept. 30, 1975, Emergency Petroleum Allocation Act of 1975 signed into legislation by President Ford 96a-98a
12. Emergency Petroleum Allocation Act Extending to December 15, 1975 .....99a-125a
13. Economic Stabilization Act of 1970 .... 126a-146a

TABLE OF CITATIONS

CASES:

American President Lines, Ltd. v. S. Woolman, Inc., 239 F. Supp. 833 (S.D. N.Y., 1964) .. 15
Byrne v. Simon, C.A. No. 174-372 (D. N.J., filed March 19, 1975) 9
Commonwealth of Pennsylvania ex rel. Creamer v. United States Department of Agriculture, 469 F. 2d 1387 (3rd Cir. 1972) 12
Florida v. Weinberger, 492 F. 2d 488 (5th Cir. 1974) 12
Mandel v. Simon, 493 F. 2d 1239 (TECA 1974) 9
Massachusetts v. Laird, 400 U.S. 886 (1970) 17

Massachusetts v. Laird, 451 F. 2d 26 (1st Cir. 1971) 17
Massachusetts v. Mellon, 262 U.S. 447 (1923) 12, 15, 16, 17
New York v. United States, 326 U.S. 572 (1946) 9
Oklahoma v. Civil Service Commission, 330 U.S. 127 (1947) 17
Schlude v. Commissioner, 372 U.S. 128 (1963) .. 15
Shapp v. Simon (TECA No. 3-8, September 17, 1975) 2, 6, 13
South Carolina v. Katzenbach, 383 U.S. 301 (1966) 17
Thompson v. Louisville, 362 U.S. 199 (1960) .. 10
United States v. Carter, 171 F. 2d 530 (5th Cir. 1948) 15
United States v. Powell, 330 U.S. 238 (1947) .. 10
United States v. Ruzicka, 329 U.S. 287 (1946) .. 10
United States v. Standard Oil Co., 332 U.S. 301 (1946) 10
United States v. Zazove, 334 U.S. 602 (1948) .. 10
Washington v. F.C.C., 513 F. 2d 1142 (9th Cir. 1975) 12, 16, 17
Washington v. United States, 357 U.S. 348 (1958) 10
Wilkinson v. United States, 365 U.S. 399 (1961) 15
Williams v. Lee, 358 U.S. 217, 218 (1959) 11

STATUTES:

United States Code, Title 5:
§§701-706 5
United States Code, Title 12:
§1904 (Supp. 1975, Notes §§201 et seq.) 4, 5

United States Code, Title 15:
§§751 et seq. (as amended) 4, 13
§§753(b)(1)(F) 8
United States Code, Title 28:
§1254(1) 2
§§1331 and 1337 5
§§2201 and 2202 5

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75-775

MILTON J. SHAPP et al.,
Petitioners

v.

FRANK G. ZARB et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Milton J. Shapp, Governor of the Commonwealth of Pennsylvania et al., hereby petition that a writ of certiorari issue to review the judgment of the Temporary Emergency Court of Appeals entered in this case on October 30, 1975.

I. OPINIONS BELOW

The first opinion of the District Court is not reported and appears in the Appendix at 32a-43a. The opinion of the Temporary Emergency Court of Appeals, on the first appeal of this case is reported. *Shapp v. Simon,* 510 F. 2d 379 (TECA 1975), and appears in the Appendix at 44a-48a. The second opinion of the District Court, upon the remand of the Temporary Emergency Court of Appeals is not reported and appears in the Appendix at 49a-58a. The per curiam opinion of TECA upon the second appeal is not reported and appears in the Appendix at 59a-64a. The order of TECA of October 30, 1975, Judge Frank M. Johnson, Jr., dissenting, denying petitioners' request for reconsideration and rehearing is not reported and appears in the Appendix at 65a.

II. JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on September 18, 1975. A timely petition for reconsideration and rehearing was denied on October 30, 1975, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

III. QUESTIONS PRESENTED

I. Is this controversy moot?

A. Does a real and substantial controversy admitting of specific relief continue to exist by Congress' retroactive and prospective extension of the EPAA and the regulations promulgated thereunder?

B. Does the expiration of the EPAA render moot an enforcement proceeding which seeks to remedy injuries caused by violations of the Act and the regulations promulgated thereunder?

II. Does the Commonwealth of Pennsylvania have standing to sue?

A. Does the Commonwealth of Pennsylvania have standing as a state which has been delegated responsibility and authority by federal statutes and regulations, i.e., as part and parcel of the regulatory scheme?

B. Does the Commonwealth of Pennsylvania have standing on behalf of itself, as it has responsibility for the health, safety and welfare of persons within its borders?

C. Does the Commonwealth of Pennsylvania have standing as a user of petroleum products? Is an administrative remedy available to plaintiffs and if so, is exhaustion required?

D. Does the Commonwealth of Pennsylvania have standing as a collector of revenues based on sales of petroleum products within its borders?

E. Does the Commonwealth of Pennsylvania have standing as *parens patriae?*

1. Is *Massachusetts v. Mellon* a bar to Pennsylvania's standing as *parens patriae?*

2. Has *Massachusetts v. Mellon* lost its vitality?

IV. STATUTORY PROVISIONS INVOLVED

United States Code, Title 12, §1904 (Supp. 1975, Notes §§201 *et seq.*)

United States Code, Title 15, §§751 *et seq.* (as amended).

V. STATEMENT OF THE CASE

Upon proof positive that FEA had, *inter alia*, grossly malapportioned the petroleum allocation to Pennsylvania, the Commonwealth, and its officials, commenced this action in the United States District Court for the Eastern District of Pennsylvania seeking injunctive relief against FEA and certain oil company defendants.[1] The jurisdiction of the district court was invoked *inter alia* pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. §1904 (Supp. 1975, notes §210) and Section 5 of the Emergency Petroleum Allocation Act of 1973, P. L. 93-159.[2] After nearly two years of litigation and two appeals to TECA, Pennsylvania's standing to sue has still not been determined.

In general terms, Pennsylvania alleged that FEA had improperly calculated the allocation of petroleum to Pennsylvania's suppliers, that the oil company defendants violated FEA's regulations in violation to Pennsylvania, that FEA did not and continues not to properly enforce its regulations as to the oil company defendants, all to the detriment of Pennsylvania and those it represents. The

[1] Maryland and New Jersey also commenced separate actions against FEA asserting with Pennsylvania discrimination by FEA toward the entire Northeastern Seaboard in its petroleum allocation program. These actions, like Pennsylvania's, were stifled at early stages because of the undecided issue of standing of a state to sue a federal agency.

[2] The district court's jurisdiction was also invoked pursuant to 5 U.S.C. §§701-706, 28 U.S.C. §§1331, and 1337. Pursuant to 28 U.S.C. §§2201 and 2202, declaratory relief was also requested.

complaint alleged that wrongful conduct of the FEA and various oil companies had resulted in the improper diminution of the allocations of petroleum which FEA made available to the Commonwealth and other users of petroleum in Pennsylvania in violation of the congressional standards mandated in the Emergency Petroleum Allocation Act of 1973 ("EPAA" or "Act").

Each of the defendants, led by FEA, challenged the Commonwealth's standing to sue in the district court. FEA filed a motion to certify constitutional question, on the grounds that whether "Pennsylvania possesses standing to bring and maintain this action against the United States . . ." presents "a substantial constitutional issue." The district court's grant of FEA's certification motion was reversed by TECA, *Shapp v. Simon*, 510 F. 2d 379, 381 (1975), and remanded for consideration of statutory questions of standing before reaching the constitutional issue. On remand the lower court dismissed the Commonwealth's complaint for lack of standing on both statutory and constitutional grounds (App. 58a). The Commonwealth took a timely appeal to TECA. While the appeal was pending, but after the "expiration" of the Act, FEA moved to dismiss the appeal because of mootness. The Commonwealth opposed this motion on the grounds that its complaint was a "pending enforcement proceeding" seeking to vindicate rights created under the Act and to correct violations of the Act which had vested and accrued before the Act expired. Nonetheless, TECA dismissed the appeal by per curiam opinion holding that the expiration of the Act caused the controversy to become moot and that the "supervening mootness prevents us from reviewing the issue of standing." TECA vacated the district court's order dismissing the complaint for lack of

standing and remanded with directions to enter a new order of dismissal for mootness.

Congress and the President thereafter extended the life of the Act and regulations to November 15, 1975, and again subsequently extended the Act and regulations to December 15, 1975. Those extensions provide for the retroactive application of the Act and regulations to August 31, 1975, the date of the alleged "expiration". Thus, the Act remains intact today.

The Petitioners then filed with TECA a timely petition for reconsideration and rehearing asserting, that the Act and regulations never expired or, alternatively, assuming *arguendo* that they did expire, that the expiration could not extinguish rights and liabilities which had already accrued and which were the bases of the cause of action commenced prior to the alleged expiration of the Act. TECA denied that petition in an order dated October 31, 1975, Judge Frank M. Johnson, Jr., dissenting (App. 65a).

It is from the order of the TECA dismissing the complaint for mootness and the district court's order dismissing the complaint for want of standing that petitioners seek a writ of certiorari and the review of this Court.

VI. REASONS FOR GRANTING THE WRIT

A. The Question Presented in This Case Is a Matter of Great Public Concern

Pennsylvania stresses in the strongest possible terms that this action raises substantial and important questions. The energy crisis is not and will not be over in the short run and the issue of the standing of a state to compel proper conduct by the FEA and those it is charged with regulating will have increasing impact in the years to come. The extensions of the life of the Act and regulations indicate Congress' continuing concern with energy allocation and enforcement of the Act and regulations. Petitioners' action reflects this public concern.

Pennsylvania generally has asserted that under the Emergency Petroleum Allocation Act, §4(b)(1)(F), petroleum products are to be allocated equitably as to quantity and price among all regions and areas of the country and that in February and in March, 1974, the oil company defendants and FEA, in violation of the statutes and regulations, both acted and failed to act so that Pennsylvania received less than its proper share of petroleum products from the oil company defendants. As of the present date, those short allocations still have not been replaced. Moreover, Pennsylvania asserted that even though FEA's allocation to Pennsylvania was less than proper, the oil company defendants had failed to deliver the amount of petroleum products which FEA regulations had mandated. Additionally, Pennsylvania asserted that, because of the improper acts of FEA and the oil company defendants, petroleum prices charged in Pennsylvania were higher than those charged in other states and that even within Pennsylvania there was an improper disparity of petroleum prices. Pennsylvania also alleged that, with particular impact to and within Pennsylvania, oil company defendants were not complying with the timely filing requirements of the regulations; that oil company defendants had, by various direct and indirect means, accumulated hidden excess inventories; that oil company defendants were not complying with FEA regulations regarding inventories; and, that FEA was not enforcing its regulatory functions with regard to oil company inventories, all to the detriment of Pennsylvania and its citizens.

It cannot be gainsaid that to the extent that the allocation to Pennsylvania is inequitable, large numbers of Pennsylvanians and people passing through Pennsylvania are inequitably treated and harmed. That the Commonwealth suffers a harm also cannot be gainsaid. The Commonwealth of Pennsylvania urges in the strongest possible terms that the issues raised in this litigation are of great public concern and are appropriate for review by this Court. *Cf. New York v. United States,* 326 U.S. 572, 574 (1946).

The importance of the issues involved is demonstrated by the numerous cases brought by other states seeking redress of violations of the Act and regulations and asserting various grounds for standing. See, *e.g. Mandel v. Simon,* 493 F. 2d 1239 (TECA 1974); *Byrne v. Simon,* C.A. No. 174-372 (D. N.J., filed March 19, 1975). Hence, it is desirable that this Court render a definitive ruling as to whether a state does have standing to sue the federal government under the bases asserted by

the Commonwealth in its complaint. *Cf. United States v. Standard Oil Co.*, 332 U.S. 301, 302-03 n. 2 (1946); *United States v. Powell*, 330 U.S. 238, 240 (1947). Another significant factor for this Court to consider is that at stake in this litigation are millions of dollars in excess costs to Pennsylvania consumers due to the respondents' unlawful allocation of petroleum products in Pennsylvania. *Cf. United States v. Zazove*, 334 U.S. 602, 613-14 n. 17 (1948). Finally, there is presently pending no case on this Court's docket of which petitioners' counsel is aware, which raises these questions of importance in the administration of the EPAA. *Cf. United States v. Ruzicka*, 329 U.S. 287, 288 (1946).

This case presents an important issue, capable of repetition and evading review as the issue arose during a dire emergency, the recent Arab oil embargo, where the plaintiffs needed and were entitled to prompt relief but were unable to secure it because of the issue then and now presented of a state's standing to sue for the violation of federal statutes and regulations committed by a federal agency. Although the "dire circumstances" have presently abated, this Court should still consider this important question of standing, to avoid a two year delay in getting emergency relief when the issue next arises.

B. The Courts Below Erroneously Decided the Issues

Although it is conceded that this Court does not usually grant certiorari merely on the ground that the lower court incorrectly decided the issue; but see, *Thompson v. Louisville*, 362 U.S. 199 (1960); *Washington v. United States*, 357 U.S. 348 (1958); the erroneous nature

of the decision below along with the importance of the questions presented do suggest the appropriateness of the grant of certiorari in the instant case. *Cf. Williams v. Lee*, 358 U.S. 217, 218 (1959). That the correctness of the decisions below is open to serious question is an understatement, to say the least.

The petitioners' amended complaint[3] shows quite clearly that Pennsylvania asserted the following five independent theories of standing:

> (1) as a state which has been delegated responsibility and authority by federal statutes and regulations (10 C.F.R. 211, 15 *et seq.*, 39 Fed. Reg. 1935 (January 15, 1974) to allocate scarce petroleum products within Pennsylvania. (Amended Complaint, ¶6, 7, 22, 23, 55);
>
> (2) on behalf of itself, as it has responsibility for the health, safety, and welfare of persons within its borders (Amended Complaint, ¶6);
>
> (3) as a user of petroleum products (Amended Complaint, ¶6);
>
> (4) as a collector of revenues based on sales of petroleum products within its borders (Amended Complaint, ¶6); and
>
> (5) as *parens patriae* on behalf of persons within its borders who have been and will be harmed by the wrongful acts of the defendants (Amended Complaint, ¶6).

---

[3] Petitioners filed a motion for leave to file an amended and supplemental complaint (App. at 1a-2a), which amended complaint was considered by the district court in its opinion and order dismissing petitioners' action.

The district court erroneously stated that Pennsylvania asserted only *four* theories of standing (App. at 50a). The court never considered the first basis of standing: "as a state which has been delegated responsibility and authority by federal statutes and regulations . . . to allocate scarce petroleum products within Pennsylvania." The standing of a state which has been delegated responsibility and authority by federal statutes and regulations as an integral part of the regulatory scheme has been recognized in *Washington v. F.C.C.*, 513 F. 2d 1142 (9th Cir. 1975); *Florida v. Weinberger*, 492 F. 2d 488 (5th Cir. 1974); and *Commonwealth of Pennsylvania, ex rel. Creamer v. United States Department of Agriculture*, 469 F. 2d 1387 (3rd Cir. 1972). Yet the district court failed to consider this ground for standing, and summarily rejected three others. The court held that the only viable theory of standing for the Commonwealth was *parens patriae* (App. at 54a) and that *Massachusetts v. Mellon*, 262 U.S. 447 (1923), barred Pennsylvania from asserting that theory against the federal government. (The misapplication of *Mellon* to the instant case and the loss of vitality of *Mellon* are considered in the following section, *infra.*) The district court thereupon dismissed the action for want of standing (App. at 58a).

It is unfortunate indeed that the district court's misreading of petitioners' amended complaint left unanswered the important issues raised herein. The court of appeals compounded this error by not reaching the question of standing because it believed that the controversy had become moot during the pendency of the appeal due to the alleged expiration of the EPAA by its terms on August 31, 1975. TECA vacated the district court's order and remanded with direction to enter a new order of dismissal on the ground that the "expiration" of the Act rendered the controversy moot. *Shapp v. Simon*, (TECA No. 3-8, September 17, 1975) (App. at 59a-64a).

Congress subsequently extended the Act and regulations to November 15, 1975 (App. at 92a-95a). The President signed this legislation into law on September 29, 1975 (App. at 96a-98a). Sections 2 and 3 of that legislation respectively provide for the retroactive application of the Act and regulations to August 31, 1975, the date of the "expiration" of the original Act. Moreover Section 4 provides that "[d]uring the period of this extension it is the intent of the Congress that the status quo shall be maintained. . . ." This legislation was due to expire by its own terms on November 15, 1975. However, Congress has once again extended the Act and regulations to December 15, 1975. P. L. 94-133. The President signed this bill into law on November 14, 1975 (App. at 99a-125a).

In effect the Act and regulations never have expired. The remarks of Congressman Dingell on the floor of the House are pertinent:

> "Mr. Speaker, during previous consideration of an extension of the Emergency Petroleum Allocation Act the question of notice to all interested persons regarding the retroactive application of such an extension was debated. That debate indicated that it was the intent of Congress to extend the Allocation Act without hiatus and that any such extension would retroactively take effect. The extension we have passed today should be interpreted in light of this history and prior debate. As further indication

of this intent, I include as part of this statement the ruling of the Federal Energy Administration regarding retroactive extension of the Allocation Act:

. . .

"Judicial precedent supports the FEA's and the Congress' determination of that enactment of the EPAA of 1975 can lawfully reinstate the FEA's Mandatory Petroleum Allocation and Price Regulations as though they were continuously in force during the hiatus period, particularly where there was, as in this case, a clear expression of Congress's intention in this regard and extensive notice to the public that the EPAA of 1973 would be extended on a retroactive basis. See Porter v. Senderowitz, 158 F. 2d 435 (3rd Cir. 1946), *cert. denied,* 330 U.S. 848 (1947); Porter v. Shibe, 158 F. 2d 68 (10th Cir. 1946); Purvis v. United States, 501 F. 2d 311 (9th Cir. 1974); First National Bank v. United States, 420 F. 2d 725 (Ct. Cl.), *cert. denied,* 398 U.S. 950 (1970)."

TECA held, however, that the Act did expire and that "supervening mootness prevents us from reviewing the issue of standing." Although the legislation extending the Act was timely brought to the attention of TECA in petitioners' petition for reconsideration and rehearing, that court nonetheless summarily denied that petition, Judge Frank M. Johnson, Jr., dissenting. Despite Congress' clear intention to extend the Act and regulations without hiatus to December 15, 1975, the petitioners find themselves out of court due to the alleged expiration of the EPAA. Only review by certiorari can remedy this anomalous situation.

Assuming *arguendo* that, notwithstanding the clear intention of Congress and the President, the Act and regulations did somehow expire, Petitioners contend that a cause of action commenced and pending prior to this Act's expiration should not thereby be rendered moot. The expiration of a temporary statute does not, unless the statute provides otherwise, extinguish liability incurred while the statute was in effect. *United States v. Carter,* 171 F. 2d 530, 532 (5th Cir. 1948); *American President Lines, Ltd. v. S. Woolman, Inc.,* 239 F. Supp. 833, 838 (S.D. N.Y. 1964). The Act does not so provide. Moreover this action is a "pending enforcement proceeding" to enforce the allegedly expired statute in relation to violations occurring prior to the alleged expiration. This action should survive the alleged expiration of the EPAA and regulations.

C. The Lower Court Has Misconstrued and Misapplied the Doctrine Enunciated by This Court in Massachusetts v. Mellon [4]

The district court erroneously held that under "the barrier established in *Massachusetts v. Mellon,* 262 U.S. 447 (1923), . . . a state, as *parens patriae,* may not sue the federal government" (App. at 55a). The court apparently misconstrued *Mellon* to stand for the proposition that a state may *never* properly sue as *parens patriae* the federal government to protect its citizens from a violation of a federal statute and regulations. That proposition would then render the following language in *Mellon* a nullity:

---

[4] See *Schlude v. Commissioner,* 372 U.S. 128, 130 (1963); *Wilkinson v. United States,* 365 U.S. 399, 401 (1961).

> "We need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the *right* to do so does not arise *here*." 262 U.S. at 485 (emphasis added).

It is submitted that the district court misapplied *Mellon* to the issues underlying the instant controversy. The Ninth Circuit in an action raising similar principles of law held:

> "The doctrine of Massachusetts v. Mellon is not applicable to this proceeding. Massachusetts had alleged that a federal statute was unconstitutional as a usurpation by Congress of power reserved to the states. As the Court pointed out in Georgia v. Pennsylvania Railroad, supra, Massachusetts sought to litigate a 'question of distribution of powers between the State and the national government' (324 U.S. at 445, 65 S. Ct. at 720), and 'protect her citizens from the operation of federal statutes' (*id.* at 447, 65 S. Ct. at 721). There are no such questions here. WUTC (an agency of the state), does not attack the constitutionality of the Communications Act on any ground; rather, it relies upon the federal statute, and seeks to vindicate the congressional will by preventing what it asserts to be a violation of that statute by the administrative agency charged with its enforcement. That federal agency is not the only public body that may invoke judicial assistance to enforce the Act." *Washington v. F.C.C.*, 513 F. 2d 1142, 1153 (9th Cir. 1975).

Likewise, the Commonwealth in the case *sub judice* has neither challenged the constitutionality of the EPAA nor

the distribution of powers between the state and the national government. Rather the Commonwealth *relies* upon the EPAA and seeks to vindicate the congressional will by preventing what it asserts to be a violation of that statute by the administrative agency charged with its enforcement. Thus, the issues presented in this case bring it squarely within the limitation of *Mellon* as enunciated by the Ninth Circuit in *Washington v. F.C.C.*, 513 F. 2d 1142, 1153 (9th Cir. 1975).

Assuming *arguendo* that Pennsylvania's action *parens patriae* against the federal government is seemingly foreclosed by this Court's decision in *Massachusetts v. Mellon, supra,* it is submitted that that doctrine is ripe for reexamination and possible overruling or limitation.

This Court has already substantially limited the application of *Mellon* in *Oklahoma v. Civil Service Commission,* 330 U.S. 127, 129 (1947), and *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). Mr. Justice Douglas' dissent in *Massachusetts v. Laird,* 400 U.S. 886, 887-91 (1970), properly observes at 889 that time has eroded the vitality of *Mellon.* The traditional theory that a state generally cannot sue the federal government *parens patriae* may be inadequate where the very claim is, as here, that the "parent" is injuring the "children". *Cf. Massachusetts v. Laird,* 451 F. 2d 26, 29 (1st Cir. 1971).

Generally speaking, the law of standing has been substantially liberalized since the relatively placid times of *Massachusetts v. Mellon.* The issues raised in the litigation underlying this petition for a writ of certiorari present this Court with the opportunity to reexamine and reevaluate the vitality of a doctrine enunciated over fifty years ago.

VII. CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the petition for writ of certiorari in this case to review the judgment of the Temporary Emergency Court of Appeals of the United States and the dismissal of this action, without a hearing, by the District Court.

Respectfully submitted,

LAWRENCE SILVER
HOWARD M. SNYDER
Deputy Attorneys General
ROBERT P. KANE
Attorney General
Attorneys for Petitioners

Department of Justice
Capitol Annex Building
Harrisburg, Pa. 17120